Supreme Court, U.S.
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No. : _____

In the

Supreme Court of the United States

TIMOTHY O. SONUGA,

Petitioner,

-against-

SECRETARY MICHAEL CHERTOFF,
DEPARTMENT OF HOMELAND SECURITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

LAW OFFICES OF K.C. OKOLI, P.C.
Attorneys for Petitioner
330 Seventh Avenue, 15th Floor
New York, New York 10001
(212) 564-8152

ne 2009

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. After an employer has articulated a non-retaliatory reason for failure to promote, is a Title VII plaintiff who seeks legal relief and who made out a *prima facie case* for retaliatory non-promotion at the summary judgment stage, entitled to exercise his constitutionally guaranteed right to jury trial on whether the reason proffered by his employer is a pretext for retaliation?

2. By holding that an unlawful retaliation plaintiff in *a jury case,* who had established a *prima facie* case, failed to demonstrate that the employer's articulated non-retaliatory reason for not promoting him was a pretext for retaliation, did the courts below not decide the ultimate jury question in conflict with such cases as *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 67 L.Ed.2d 207, 101 S. Ct. 1089 (1981) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed. 2d 407, 113 S. Ct. 7242 (1993).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Timothy O. Sonuga ("Sonuga") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported as *Sonuga v. Chertoff*, 303 Fed. Appx. 901 (2d Cir. 2008). It is reproduced in the Appendix (hereafter "App.") at 1a-4a. The opinion of the District Court granting respondent's motion for summary judgment is unreported. The record of the summary judgment oral argument and the order and judgment of the District Court based thereon are reproduced at App. at 5a-28a.

JURISDICTION

The Second Circuit Court of Appeals' opinion was issued on December 18, 2008. App. at 1a-4a. A timely petition for rehearing was denied on March 17, 2009. (App. at 29a-30a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Seventh Amendment to the Constitution of the United States.
2. Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000-e et. seq., as amended.

STATEMENT OF THE CASE

During his career of almost 20 years with the United States Government, Sonuga was promoted only twice despite his numerous applications for promotion; his first promotion came in December 1996, after 7 years of service, and the second one came in April 2007, as a result of this litigation. Sonuga, a 64 year old Nigerian-born naturalized United States citizen, began working for the Department of Homeland Security, Customs and Border Protection ("CBP") and its predecessor organization, the United States Customs, in July 1989. Prior to his employment with the United States Customs, Sonuga had already earned a bachelor's degree from Southern Illinois University in 1976 and a Master's degree in Management and Public Administration from Webster University, Missouri, in 1979. Sonuga's post-college work experience before working for the United States Customs included working for the Food and Drug Administration ("FDA") as a Safety Inspector. As a CBP employee, Sonuga had never been told that his job performance was anything but stellar. Indeed, Sonuga had trained and mentored many of his co-workers, including one Gary Melofchik, a much younger Caucasian co-worker who was subsequently promoted over him in February 2004.

Sonuga brought the present lawsuit under Title VII for damages, alleging that he was denied promotion in April 2005 by Susan Mitchell, Director of Field Operations ("DFO") for CBP, because he had engaged in the protected activity of filing a prior EEOC discrimination complaint, testifying and

participating at the hearing of that complaint up until February 2005. During the processing of Sonuga's prior discrimination complaint by the EEOC, Kathleen Haage-Gaynor, CBP Area Director, Newark/New York, recommended Sonuga to Ms. Mitchell in December 2004, as the person ranked #1 for the promotion which is the subject of the current retaliation litigation.[1]. Ms. Haage-Gaynor testified that, since Ms. Mitchell became the DFO, Ms. Mitchell had never failed to act on her recommendation for promotion to supervisory import specialist - the same position Sonuga was seeking. Ms. Haage-Gaynor further testified that, from her experience, it takes *no more than 8 weeks* from when a recommendation for promotion to such a supervisory position is made to Ms. Mitchell, as DFO, to when the promotion is in fact effected. The record evidence shows promotions to similar positions which were effected in as little as from 6 days to 6 weeks. Yet, there is nothing in the record to demonstrate that Ms. Mitchell took any action at all on Sonuga's recommendation *for more than 10 weeks after she received the recommendation.* Rather, after this long unexplained delay, and after she learned in early March 2005, of the EEOC's dismissal of Sonuga's discrimination complaint, Ms. Mitchell made the decision to then reassign FNISs to fill the two vacancies.

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[1] Salvatore Ingrassia, the other person recommended to Ms. Mitchell, unlike Sonuga who was a GS-12 employee, was already a GS-13 employee and, therefore, was to be laterally transferred (not promoted) to the vacant GS-13 spot. (A 222-223).

At the conclusion of discovery, the Government moved for summary judgment and the District Court granted summary judgment. The court concluded, essentially, that, in reassigning FNISs, Ms. Mitchell was only acting on the instructions of Mr. John Leonard, her superior in Washington, D.C. The District Court went on to say: "Obviously, the junior supervisor [Mitchell] who was given responsibility [by Leonard] is responding to what her headquarters tells her she has to do" (Emphasis supplied). But the record in this case conclusively shows that this is incorrect. Ms. Mitchell was solely responsible for both the timing and the decision to reassign FNISs, thus denying Sonuga promotion to the position. It is noteworthy that none of the FNISs applied for the position to which they were reassigned by Ms. Mitchell.

Although the District Court found that Sonuga made out a *prima facie* case of retaliatory non-promotion, the court went on to conclude that Sonuga did not establish that Ms. Mitchell's reason for the reassignment was false and that the reassignment was a pretext for retaliation. The court thus denied Sonuga his constitutionally guaranteed right to a jury trial on the issue of whether or not the reassignment of FNISs by Ms. Mitchell at the time that she did was a pretext for failure to promote him in retaliation for his prior EEOC action. Judgment was entered in the District Court dismissing Sonuga's complaint, and a timely appeal followed. By its Summary Order filed on December 18, 2008, the Circuit Court of Appeals affirmed.

Petitioner timely sought review of the Order of the Second Circuit Court of Appeals affirming the

District Court grant of summary judgment to the Respondent on Petitioner's retaliatory failure to promote claim. The Circuit Court denied panel and *en banc* review despite the fact that the determination denied Sonuga his right to jury trial on the ultimate issue in the case.

REASONS FOR GRANTING OF THE PETITION

A. The Decisions of the Courts Below Improperly Deprived The Petitioner Herein of His Constitutional Right to a Jury Trial, and Undermined this Court's Precedents on Summary Judgment Cases

This is a Title VII case in which Sonuga exercised his right to a jury trial under the *Seventh Amendment* by demanding a jury trial in his Complaint. The District Court clearly found that Sonuga established a *prima facie* case of retaliation. Having so found, the District Court then went on to consider the Government's reason for the lateral transfers and concluded that the Government had articulated a legitimate, "nondiscriminatory reason for the adverse employment action of which plaintiff complains".

At that stage of the litigation, the presumption of retaliation "drops from the picture". Although that presumption drops, '*the trier of fact* may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom...on the issue of whether the defendant's explanation is pretextual," *Burdine, supra*, at 255, n. 10'. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143.

It is noteworthy that it is the trier of fact who bears the legal responsibility of determining whether an employer's proffered non-retaliatory reason is pretextual, and not the District Court judge sitting as a motion court on summary judgment. The

District Court did not find that there was a total absence of evidence in the record for Sonuga's contention that Ms. Mitchell's conduct was a pretext for retaliation; rather, the court concluded, "With regard to that point [pretext], Mr. Okoli, I find that there is no sufficient evidence in the record". (Emphasis supplied). First, it is submitted that there is sufficient evidence in the record on which a rational trier of fact may find for Sonuga. Secondly, the District Court usurped the jury's function by engaging in fact- finding. Whether or not *sufficient evidence* exists in the record to support pretext for retaliation is a question for the fact finder i.e. the trial jury in this case. It is submitted that the District Court erred in acting as a "fact finder" - and the Circuit Court erred by affirming same.

It is for the jury to decide whether or not Sonuga discharged his ultimate burden of establishing, on a preponderance of the evidence, that Ms. Mitchell's conduct was pretextual. This is particularly so in light of the fact that the jury's disbelief of the Government's non-retaliatory explanation, coupled with Sonuga's already established *prima facie* case, will permit a rational jury to find for Sonuga on that ultimate issue. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511.

While it is true that this Court has put it beyond peradventure that a plaintiff bears the ultimate burden of proving retaliation or discrimination once a defendant articulates a non-discriminatory reason for its questioned conduct, it does not appear that this Court has ever decided that a civil rights plaintiff is required to discharge this ultimate burden at the summary judgment

stage. This Court's cases on the point went through trials - whether bench or jury - and passages from those cases, clearly contemplate a trial at which plaintiff will discharge his ultimate burden.

For example, in St. Mary's Honor Center, after finding that a defendant's proffered non-discriminatory reason suffices to rebut a plaintiff's prima facie case, the Court went on to say that 'the plaintiff has then the "full and fair opportunity to demonstrate," *through presentation of his own case and through cross-examination of the defendant's witnesses*, "that the proffered reason was not the true reason for the employment decision" id, at 256, and that race was.' *Id.*, at 508. (Emphasis supplied). Obviously, a plaintiff can only cross-examine witnesses at a trial or hearing, not on a motion for summary judgment.

The burden which a plaintiff alleging discrimination or retaliation by his employer carries to survive a summary judgment motion at the prima facie stage is not a heavy one. St. Mary's Honor Center. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, appeal was taken after a bench trial in the district court. This Court consistently uses the words, "the trier of fact", "the fact finder", "an appropriate fact finder", etc., to describe the person before whom the plaintiff must discharge his ultimate burden after the defendant has articulated or proffered a non-discriminatory reason for its actions. It is submitted that 'fact finder' referenced in these cases, is not the district judge at summary judgment; rather, it is the district judge sitting at a bench trial, or a jury at a jury trial.

By affirming, as it did, despite Sonuga's prima facie case, the Circuit Courts denied Sonuga his constitutionally guaranteed right to jury trial under the *Seventh Amendment* .... a jury trial on whether Ms. Mitchell's conduct was a pretext for unlawful retaliation against Sonuga. As a litigant making a legal claim under Title VII, Sonuga is entitled to a jury trial under the Seventh Amendment. See Chauffeurs v. Terry, 494 U.S. 558; Curtis v. Loether, 415 U.S. 189.

B. There Is Need to Clarify Whether a Civil Rights Plaintiff Must Establish "Pretext" at Summary Judgment or at Trial

This Court's consistent use of phrases like "fact finder", "trier of fact" and the like, as well as dicta in the civil rights cases decided by this Court in which pretext came up suggest that pretext is required to be established at trial. See St Mary Honor Center, *Id.*, Burdine, *Id.*, and Reeves, *Id.* The present case brings up the need to clarify at what stage in litigation a civil rights litigant who makes out a prima facie case of retaliation is required to demonstrate pretext for retaliation where the employer articulates a non-discriminatory reason for the challenged conduct. This need is particularly felt in light of Circuit Court decisions which suggest that a civil rights plaintiff *in a jury case* must prove pretext to survive summary judgment.

For the court to require a civil rights plaintiff who made out a prima facie case of retaliation, to demonstrate pretext at the summary judgment stage, deprives such a plaintiff of the opportunity to

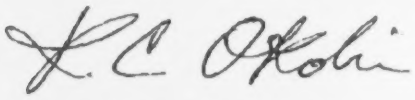
present his own case by relying upon facts forming his prima facie case *and through cross-examination of the defendant's witnesses.* See St. Mary's Honor Center.

In this case, certiorari is warranted to clarify this seemingly puzzling situation, and to provide guidance for both the Circuit Court and counsel for civil rights plaintiffs.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that a writ of certiorari be granted.

Respectfully Submitted,



K.C. OKOLI, ESQ.
Attorney for Petitioner
TIMOTHY O. SONUGA
330 Seventh Avenue, 15th Floor
New York, New York 10001
(212) 564-8152

TIMOTHY O. SONUGA, Plaintiff-Appellant v. SECRETARY MICHAEL CHERTOFF, DEPARTMENT OF HOMELAND SECURITY, Defendant-Appellee.

No. 07-3895-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

303 Fed. Appx. 901; 2008 U.S. App. LEXIS 25636

December 18, 2008, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**]

Appeal from an order of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, Judge).

COUNSEL: FOR APPELLANT: K.C. OKOLI, Law Offices of K.C. Okoli, P.C., New York, NY.

FOR APPELLEE: JOSEPH A. PANTOJA, Assistant United States Attorney (Michael J. Garcia, U.S. Attorney and Sarah S. Normand, Assistant U.S. Attorney, on the brief) United States Attorney's Office for the Southern District of New York.

JUDGES: PRESENT: WILFRED FEINBERG, JOSE A. CABRANES, RICHARD C. WESLEY, Circuit Judges.

OPINION

[*901] SUMMARY ORDER

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Plaintiff-appellant, Timothy O. Sonuga, an employee of the Department of Homeland Security ("DHS") appeals from an August 10, 2007 order of the District Court granting summary judgment to the defendant-appellee after plaintiff brought suit under Title VII of the Civil Rights Act of 1964, *42 U.S.C. §§ 2000e et seq.*, alleging that he was not promoted in retaliation for his invocation of DHS's Equal Employment Opportunity process. On appeal, plaintiff contends that the District Court erred in (1) granting defendant's motion because the Court failed to correctly [**2] draw all inferences in his favor, and (2) in failing to reopen discovery to permit him to take an additional deposition. We assume parties' familiarity with the facts and procedural history of this case.

We review a district court's grant of summary judgment *de novo*, construing the record in the light most favorable to the non-moving party. *See, e.g.*,

*Hoyt v. [*902] Andreucci, 433 F.3d 320, 327 (2d Cir. 2006).* "An Order granting summary judgment will be affirmed only when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Reigel v. Medtronic, Inc., 451 F. 3d 104, 108 (2d Cir. 2006) (Citing FED. R. CIV. P. 56(c)).* In order to demonstrate a genuine issue of a material fact, "the nonmoving party may not rely on conclusory allegations or unsubstantiated speculation," but must instead "present 'specific facts showing that there is a genuine issue for trial.'" *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 306 (2d Cir. 2008)*(quoting *FED. R. CIV. P. 56(e))* (some internal quotation marks omitted) (alterations omitted).

We review the District Court's denial of a request to reopen discovery of abuse of discretion. *In re Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003).*

For [**3] substantially the reasons stated by the District Court in the August 9, 2007 proceeding at which it announced its decision, Joint Appx., at 495-515 (Trans. Of proceedings dated Aug. 9, 2007), we hold that the Court's grant of summary judgment was appropriate in this case. Assuming, for the sake of argument, that plaintiff made out a *prima facie* case for retaliation under Title VII, he failed to present evidence from which a jury could conclude that the defendant's proffered, non-discriminatory explanation for its decision not to promote plaintiff was in fact a pretext for unlawful retaliation. *See Reeves v. Sanderson Plumbing Products, Inc., 530*

U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) ("Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff remains at all times with the plaintiff." (Internal quotation marks omitted) (alternation omitted)).

Further, we find that the District Court did not abuse its discretion in denying plaintiff's request to take an additional deposition and to continue another, as plaintiff failed to show good cause for modifying the scheduling [**4] order in this case. *See Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 243 (2d Cir. 2007)* ("Under *Rule 16(b)*, a party may obtain a modification of the scheduling order only 'upon a showing of good cause.'")(quoting *FED. R. CIV.P. 16(b)).*

Accordingly, the August 10, 2007 order of the District Court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

TIMOTHY O. SONUGA,

Plaintiff,

v.

SECRETARY MICHAEL CHERTOFF,

Defendant.

----------x

06 Cr. 1751 (AKH)

Argument and Decision

New York, N.Y.
August 9, 2007
4:20 p.m.

Before:

HON. ALVIN K. HELLERSTEIN
District Judge

APPEARANCES

K.C. OKOLI, ESQ.
Attorney for Plaintiff
330 Seventh Avenue
New York, New York 10001
(212) 564-8152

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
86 Chambers Street
New York, New York 10007

JOSEPH PANTOJA
Assistant United States Attorney

(Case called)

THE CLERK: In the matter Sonuga v. Chertoff. Parties, please state your name for the record.

MR. OKOLI: May it please the Court, K.C. appearing for the plaintiff.

MR. PANTOJA: Your Honor, Joseph Pantoja Assistant United States Attorney, for the defendant Michael Chertoff, Department of Homeland Security.

THE COURT: Good afternoon. Let me recite the facts as I understand them from the submissions of the parties.

First, this lawsuit as been brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 and following, complaining that the plaintiff was not promoted by the department of customs and the Department of Homeland Security.

There was an EEOC investigation in 2003 instigated by the plaintiff. During the pendency of that investigation, plaintiff again applied for promotion and was not given the position, and complains that the position was not given because of retaliation. Subsequent to the case, in April of this year, plaintiff was promoted to the grade that plaintiff sought.

Defendant moves for summary judgment. Plaintiff asks for leave to take the deposition of John Leonard, an official in the Department of Homeland Security. I told Mr. Okoli that I would deal with that issue in the context of the present motion.

This is the background. The plaintiff is Timothy Sonuga. He is 62 years old. He was born in

Lagos, Nigeria, attended high school in Nigeria, came to the United States in 1971, earned a bachelor's degree in 1976 from Southern Illinois University, and then a master's degree from that same university in management and public administration in 1978. Throughout he has pursued different courses to gain proficiency and background in various tasks that he was performing for the Department of Homeland Security.

The defendant is the secretary of the Department of Homeland Security, Michael Chertoff. The case also involves various other people:

The director of the New York-Newark area and plaintiff Sonug's fourth line supervisor Kathleen Haage-Gaynor;

The director of field operations in New York office Susan Mitchell, who is Sonuga's fifth line supervisor and was responsible for personnel recommendations made by Haage-Gaynor. So Susan Mitchell is the direct supervisor of Gaynor;

John Leonard, the chief of summary management at the office of field operations in Washington, D. C., a person who appears to have a policy position of oversight responsibility over field directors such as Mitchell.

The jurisdiction of this court arises from 28 U.S.C. sections 1331 and 1343 as a case arising under the laws or Constitution of the United States.

Sonuga began employment with the United States customs in 1989 as an import specialist. He worked in that capacity for seven years and then was promoted to entry specialist team leader in 1996. He functioned between 1996 and April 2007 in

that capacity as an entry specialist team leader, first operating in the World Trade Center, and, after the terrorist bombing of the center, thereafter in New Jersey.

The position of entry specialist team leader is said to be a technical position with no official supervisory duties and is classified as grade 12 or lower. Sonuga had a grade 12 classification and alleges that he was much involved in instruction, teaching, leadership, and other aspects that entailed supervisory responsibilities. But the job itself was considered a technical position.

On February 24, 2003, he learned that he had not been selected for promotion to grade 13, which was the classification for the next higher position of supervisory customs entry specialist. He complained to the EEOC on March 26, 2003, filing his complaint a few months later, on July 12, 2003. Sonuga complained that two younger females of European descent had been selected to the two vacant positions, and he complained against Mitchell and Haage-Gaynor, who were very much involved at the present time as well.

In October 2004, while has complaint was pending two vacancies opened for grade 13 supervisory import specialist positions. The supervisory position in grade 13 has many similarities to Sonuga's position in grade 12, but it is said that the grade 13 position emphasizes management and leadership skills and functions.

In November 2004, a month later, the agency issued a vacancy announcement notifying employees that there were two vacancies for supervisory import

specialist soliciting applications. The next month, on December 16, 2004, Haage-Gaynor recommended to Mitchell, her supervisor, two individuals as in her opinion best qualified to fill the open slots of supervisory import specialist.

One recommended person was Sonuga. A second was a younger person, a white male, Salvatore Ingrassia. Sonuga testified to the EEOC that she wrote a memo on December 16, 2004, in which she considered Sonuga to be the better qualified applicant to fill one of the positions.

Sonuga did not get the position. Mitchell asserts -- Mitchell again is Haage-Gaynor's supervisor -- that between the opening in October 2004 until March of 2005 the agency was moving forward on a long-pending personnel issue regarding a third position, a field national import specialist. This was also a grade 13 position.

But the Department of Homeland Security considered that the people who filled that position were doing the same kinds of activities that were done by supervisory import specialist and were not doing the added characteristic for the field national import specialist of preparing binding classification and rulings.

Since they were not performing that additional work, the agency, in a letter of March 2000 to the relevant federal employee union, announced its intention to eliminate almost all the positions of field national import specialist by selecting the people who filled those slots for reassignment to open supervisory import specialist

positions, the very position that Sonuga aspired to obtain.

This was the tension that confronted Mitchell and Haage-Gaynor. The position they considered open and which Sonuga Ingrassia wished to fill by promotion had also been designated for lateral transfers of people already occupying grade 13 who were doing a job that the Department of Homeland Security largely wished to cancel, therefore freeing those people who occupied that position soon to be canceled for lateral reassignment.

The lateral reassignment had to be in the same grade, if it was open, and therefore the position of supervisory import specialist held an attraction to those who were going to be transferred from the previous position they occupied of field national import specialist.

In January 2005 there were 19 grade 13 employees in the New York area and within easy commuting distance of the New York area who were excessed from the position of field national import specialist and who were available for transfer to fill the two vacancies of supervisory import specialist. Five of these thirteen people were in the Newark area, and the balance and several more were in the JFK area.

Mitchell testified that she held up making any selections for the two vacancies as supervisory import specialist until she heard from her boss Leonard regarding what would be the case with the excessed position of field national import specialist.

On February 14, 2005, the EEOC denied the complaint that Sonuga had filed in 2003 when he

was denied promotion from his grade 12 position of entry specialist team leader. Three weeks later, on March 9, 2005, Mitchell participated in a conference call with John Leonard in which they agreed that they would move forward with the plan to laterally transfer the field national import specialists into the two vacant supervisory import specialist positions.

On March 10, 2005, the next day, Leonard sent an email to Mitchell and others instructing them to move forward as was discussed in the previous day's telephone conversation. He asked for a status report on the actions taken with regard to filling the supervisory import specialist vacancies with field national import specialists.

On March 15, 2005, a few days later, the supervisory import specialists were filled with two grade 13 employees who previously had been field national import specialists: Michael Opper and Kevin Gordon. Accordingly, Sonuga and Ingrassia were not selected for promotion.

On April 4 Sonuga discovered that he had not been selected when he saw an email sent to all employees advising them that Opper and Gordon were filling the vacancies. On April 21, 2005, he began EEO counseling regarding the failure to promote him to one of the two vacant slots, and he filed a formal complaint on June 23, 2005.

On December 2, 2005, EEOC denied Sonuga's claim, and on March 6, 2006, a little over a month later, Sonuga filed the complaint in this court. His complaint is timely and it raises the issues that he has been complaining about. He seeks compensatory

damages of $2 million, punitive damages of $2 million, injunctive relief, and fees and costs.

Let me pause for a moment. Mr. Okoli, have I substantially gotten the facts right as stated?

MR. OKOLI: No. There are a few things. For instance, the last one, the EEOC never denied his claim. He asked for them to make a decision without a hearing and give him the right to sue.

THE COURT: I'm sorry. So there was no denial by the EEOC with a right-to-sue letter?

MR. OKOLI: Right, with regards to the termination.

THE COURT: Thank you for correcting me.

MR. OKOLI: It may be minor, but . . . .

THE COURT: No, no. I stopped to be corrected, and I thank you for correcting me.

MR. OKOLI: The master's degree is from a different university. I believe you said it was from the same university.

THE COURT: I think the important point here is that he deserves to be commended for his diligence in improving himself educationally and in his job. That's the reason I noted that.

MR. OKOLI: You referred to Ingrassia's position as a promotion. Ingrassia was not being promoted. He was selected because he was already a level 13. Had he been selected, that would be a lateral move. So he was not in the same category as Mr. Sonuga.

THE COURT: That's correct. But he was another applicant for the position, and Haage-Gaynor favored Sonuga to fill that position until she

learned of the lateral transfers of grade 13 from the field national import specialist position?

MR. OKOLI: That's correct.

THE COURT: Mr. Pantoja, have I gotten anything wrong from your point of view?

MR. PANTOJA: Just one clarification. With respect to the two individuals, the field national import specialists who ultimately were selected to fill the vacancies, I think you mentioned or suggested that the supervisory import specialist position, because it was a grade 13 position, appealed to them because it was of a similar grade and therefore the lateral transfer was appealing to them. The transfers were involuntary in that these two individuals were not consulted.

THE COURT: I understand.

MR. PANTOJA: So it could very well be that they might not have opposed it, that they welcomed it, but we don't know. All I know is that the agency thought it would be desirable and it was appealing to the agency to fill these two positions with these two lateral FNIS placements.

THE COURT: Thank you.

MR. PANTOJA: Thank you, your Honor.

THE COURT: Let me go on to the operative legal standards. I need not discuss the standards on a motion for summary judgment. They are well known and the cases are well known. In the Title VII context, although cases are often fact-intensive, I still have to go through the usual type of analysis with regard to these kinds of discrimination claims, namely, the burden-shifting analysis of the McDonnell Douglas case as elaborated by other cases

in this circuit, particularly Tomka v. Seiler Corp., 66 F.3d 1295, decided in 1995; Terry v. Ashcroft, 336 F.3d 128, decided in 2003; and many other cases.

It seems to me clear that Sonuga is proficient, proficient in the sense of competent, to fill the position he aspired to be promoted to, and indeed he has been most recently appointed to that position.

Having made out that case and shown that he is in a protected classification, which I find, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action of which plaintiff complains. I hold that defendant has done that by showing that the preference was given to employees already filling a grade 13 category and shifting them involuntarily, as Mr. Pantoja states, to occupy a different position.

The position they occupied, field national import specialist, was being largely closed out, and the position to which they were transferred of supervisory import specialist, also in grade 13, had two spots available, and the two particular employees involuntarily were transferred to fill those slots, closing the slot to which Sonuga aspired. That constitutes a nonpretextual, nondiscriminatory reason why Sonuga was not promoted.

The burden then shifts back to the plaintiff again. Plaintiff must show sufficient evidence to raise a triable issue to the effect that the reason given by the defendant was a pretext in that in truth and in fact there was discrimination in the form of retaliation for having exercised a right given to him by the statute, that is, seeking counseling and complaining to the EEOC. With regard to that point,

Mr. Okoli, I find that there is no sufficient evidence in the record, but I wish you to argue that point.

I find also that there is no reason to have a deposition of John Leonard at this particular point in time, because the position that he would take, namely, that the grade 13 position employees were involuntarily transferred, is documented in the record and there is no reason to gain redundant information.

Mr. Okoli.

MR. OKOLI: Yes, your Honor. You Honor, we need to be very clear about what the protected activity here comprises. It is not just simply the filing of the complaint. In fact, Title VII, 42 U.S.C. 2000e-3 includes also not only the making of a charge but, quote, where a person has, quote, participated in any manner in an investigation proceeding or hearing

I say "hearing" advisedly. Your Honor, the hearing continued until February 14th, when a decision came down. So Mr. Sonuga fully participated in a hearing. His protected activity is not just the simple fact that he complained about discrimination but that he fully participated, testified, continued, and pursued to hearing to its final conclusion.

THE COURT: I accept that point. When I said that he complained, that meant necessarily that an investigation resulted and all of this was protected activity under Section 2000e-3 subparagraph (a).

MR. OKOLI: Yes. The significance of the conclusion of the hearing is that I submit that that is

the time from which you begin to measure, not when the complaint was filed. He could have withdrawn at any point. He could have withdrawn his complaint or abandoned the complaint. But he was assiduous in pursuing the complaint until the final conclusion, including a hearing, which resulted in termination.

THE COURT: But an employee who participates in protected activity doesn't get a guarantee of promotion.

MR. OKOLI: I considered that, your Honor. I'll come to that.

Your Honor, if we accept that, then we go to the fact that in the record before you there is not one shred of document to show that the Department of Homeland Security or Susan Mitchell did anything about the transfer or discussion relating to the transfer of field national import specialist between May 2000 and March 9, 2005, a hiatus of almost five years. Nothing happened.

The testimony by her immediate supervisor, that is, Kathy Haage-Gaynor, is that it takes a maximum of eight weeks from the time that the recommendation is made to when permission is effected. She also further testified that since Ms. Mitchell became the director of field operations, she had never, never refused to follow any recommendation by her except in Sonuga's case.

Furthermore, the record, there are documents showing that promotions involving Susan Mitchell had been accomplished within anywhere between 6 days and 25 days of the recommendation being made, between 6 days and 25 days for supervisory positions such as the ones under consideration.

If we take the outside limits, which is just the say-so of Kathy Haage, which is 8 weeks, instead of the 25 days which you see in documents before you, if you take those 8 weeks, had Susan Mitchell taken timely action on the recommendation made to her on December 14, 2004, Mr. Sonuga would have been promoted at the latest by the end of January 2005. Oh, no. Middle of February. Sorry. That would be eight weeks. Eight weeks would take us to the middle of February. That is if we were to believe, even though this Court doesn't make a credibility determination, if you were to accept that.

THE COURT: We are not involved with the first problem that Sonuga had.

MR. OKOLI: No. It is the retaliation that I'm dealing with.

THE COURT: Right.

MR. OKOLI: I am dealing with the retaliation.

THE COURT: You're making the point that he wasn't promoted from 2000. That was the first complaint.

MR. OKOLI: No, no. What I said was that the reason that Mitchell has given, Mitchell is saying the reason is now we had to lateral FNIS to this position. The point I'm making is that 2000 was the last document you will find in this record. That was the last document in which the FNIS was discussed. No other document entered this record until March 2005.

THE COURT: That's correct.

MR. OKOLI: Yes. So in between that, what was going on? That matter was dead for all practical

purposes. That is my submission. Otherwise, there would be some document showing--

THE COURT: I wouldn't infer that.

MR. OKOLI: You Honor, now we're done looking at the timing. Now they decided they knew of that problem, they still went ahead and posted this position, the position that we are dealing with now. Haage-Gaynor recommended Mr. Sonuga together with Mr. Ingrassia. Ms. Mitchell did nothing about that recommendation for more than eight weeks, and there is nothing in the record showing what she was doing regarding the recommendation or regarding the FNIS. Nothing in the record.

The first thing in the record relating to FNIS that we see during the time that this recommendation was pending was an email of March 10th, which referred to a conversation of the previous day, March 9th. By her own admission, she learned of the problem of the denial of the original claim in March. That was when she learned about it. She couldn't discriminate against us unless she knew, if she was delaying it on purpose, and there is nothing to indicate otherwise, because there is nothing to show what she was doing, that it was not a deliberate delay.

Once she knew that the original complaint had been dismissed, she was emboldened now to initiate a call to D.C. There is a document here in which Mr. Leonard took pains to explain to someone else that the initiative did not come from him, the initiative came from the field. Who is the director of field operations in the field? Susan Mitchell. So why

would she wait? What was the purpose of waiting five years, doing nothing?

THE COURT: What initiative are you talking about?

MR. OKOLI: The initiative of moving, filling lateral transfer of FNIS to SIS position.

THE COURT: She was responding to Leonard's directive.

MR. OKOLI: That's what I'm saying. Leonard himself clarified in a document -- let's take two documents here. One is a letter, an email, referring to a conversation of March 9th --

THE COURT: Right.

MR. OKOLI: -- in which Susan may have participated. Then there is Exhibit 9 to the declaration of Timothy Sonuga, which is an email from Leonard to another gentleman Carl in which he was explaining that the move of FNIS was not headquarter mandated, it was field office initiated. Basically, what she was saying is that it wasn't their idea.

THE COURT: Where do you see this? Show me where the document says that. It says here, "Yes, field national import specialists have been placed into NAM." I don't know what NAM means.

MR. OKOLI: Yes, in other ports.

THE COURT: -- "positions in other ports. Bottom line, until FNIS's go away, they'll be placed into alternate staffing positions in comparable GS13 jobs, SIS first choice, NAM second choice. We will not approve any actions for new GS-13 announcements until this accomplished. Finally, until the realigning plan is fully blessed and

implemented, which will be soon, these movements are field office issued, not headquarter mandated."

I don't know what you do there. Obviously, the junior supervisor who was given responsibility is responding to what her headquarters tells her she has to do.

MR. OKOLI: But it was her that told the headquarters they wanted to do this. Remember the conversation, the earliest reference after 2000. There is nothing, no document in this record.

THE COURT: I understand that.

MR. OKOLI: It references a conversation.

THE COURT: Mr. Okoli, governments are not swift. Governments don't win races. They are very slow. Bureaucracies are not swift.

MR. OKOLI: Your Honor, let's look at the timing.

THE COURT: I take your point. There is a coincidence in time between the date of announcement of EEOC that the prior hearings and investigations and complaints are closed and a ruling comes down adverse to Sonuga and the action that's taken denying Sonuga the appointment to supervisory import specialist and giving it to other GS-13's who were being involuntary transferred from a closed-out position, but not every coincidence in time raises a prima facie case.

MR. OKOLI: Your Honor, I will be the first to concede that. But when there is coincidence after coincidence, somehow there was this delay beyond the time that that was normal as we know it, by their own account. She did nothing about this position within eight weeks. That's one coincidence.

Not until she heard that Mr. Sonuga's original complain had been denied, that was when she then calls headquarters.

THE COURT: Before that she even recommended Sonuga, indicating that she was not interested in keeping him down. But there was no action taken because action was paralyzed because of the problem that was created by closing out the FNIS position.

MR. OKOLI: Your Honor, I don't know how to characterize this. She says that, and we don't see any document to support this paralysis of action, not one shred of document. Do we expect her to say, yes, I did this? Of course she would say things that are self-serving. What was the document in this record to show that there was any paralysis of action between 2000 and 2005 and all of a sudden now, once this happened, she calls?

Besides, your Honor, even here there is something, that is incorrect. This document says we will not approve any actions for new GS-13 announcements to the computer by G-12's until this is accomplished. Your Honor, they still haven't lateralled out every FNIS, but my client is now a level 13, so this is not even true. This is not even true. They will not put in new people until the laterals everywhere. My client is now level 13, and we know there are still FNIS's all over the place. Now, we see conflicting information coming from highly placed people in customs.

THE COURT: Because he got his employment, we should infer that previously it was a retaliation that caused him to not get the

appointment? If they were retaliating, why would they give him an appointment now, when there were other FNIS's floating around?

MR. OKOLI: I wish I could answer that, your Honor, the question why they were retaliating. The fact is that the man is imminently qualified. You can only do so much.

THE COURT: No, it says he is not.

MR. OKOLI: When you run out of vacancies, you have to do the obvious. Hence, he was recommended by Haage. But then Mitchell did not want to go along with the recommendation and sat on the recommendation beyond what is reasonable according to the --

THE COURT: There is not a shred of evidence that suggests retaliation as the motive for Mitchell's inactivity, and there is every indication that he was prompted by the need to place 13 people who were filling a position that was now to be canceled.

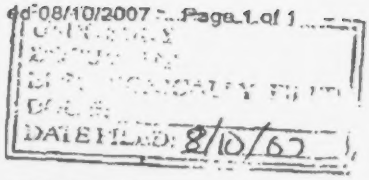
Mr. Okoli, I have read all your papers and I hear your argument. I thing the coincidence in time is not sufficient. I cannot see any evidence of discrimination based on retaliation which can raise a triable issue of fact, and I grant the government's motion to dismiss the complaint.

There are no issues to be tried. There is no reason to take the deposition of Mr. Leonard. The events that came out are clear. The reason for the denial of promotions had been fully approved by the government, namely, the surfeit of candidates who were being involuntarily transferred from a grade 13 position that was being closed out.

Thank you very much. A summary order will follow.

(Adjourned)

Case 1:06-cv-01751-AKH
Document 21
Filed 08/10/2007



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TIMOTHY SONUGA,

Plaintiff,

-against-

MICHAEL CHERTOFF, SECRETARY,
DEPARTMENT OF HOMELAND SECURITY,

Defendant.

----------X

SUMMARY ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

06 Civ. 1751 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

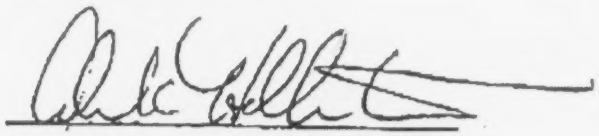
The parties appeared before me on August 9, 2007 for oral argument on Defendant's

motion for summary judgment, Fed. R. Civ. P. 56(b). For the reasons stated on the record, Defendant's motion is granted and the complaint is dismissed.

The Clerk of the Court shall mark this case as closed.

SO ORDERED.

Dated: August 10, 2007
New York, New York



ALVIN K. HELLERSTEIN
United States District Judge

Case 1:06-cv-01751-AKH
Document 22
Filed 08/13/2007

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/13/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

TIMOTHY SONUGA,

Plaintiff,

-against-

MICHAEL CHERTOFF, SECRETARY,
DEPARTMENT OF HOMELAND SECURITY,

Defendant.

----------X

06 CIVIL 1751 (AKH)

JUDGMENT

Defendant having moved for summary judgment pursuant to Fed. R. Civ. P. 56(b), and the matter having come before the Honorable Alvin K. Hellerstein, United States District Judge, and the Court, on August 10, 2007, having rendered its Order granting defendants' motion for summary judgment and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated August 10, 2007, defendant's motion for summary judgment is granted and the complaint is dismissed; accordingly, the case is closed.

Dated: New York, New York
August 13, 2007

J. Michael McMahaon

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17 day of March, two thousand and nine,

Timothy O. Sonuga,

Plaintiff-Appellant,

v.

Secretary Michael Chertoff,
Department of Homeland Security,

Defendant-Appellee.

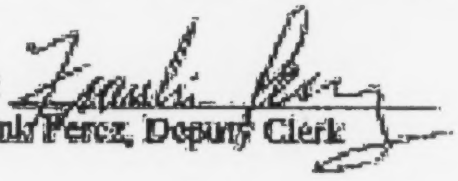
ORDER
Docket Number: 07-3895-cv

Appellant Timothy O. Sonuga having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined

the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: 
Frank Perez, Deputy Clerk